Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

BRUCE M. SKOORKA,

Petitioner.

– v. –

KEAN UNIVERSITY, THE STATE OF NEW JERSEY, THE BOARD OF TRUSTEES OF KEAN UNIVERSITY, WILLIAM M. KEMPEY, officially and individually, RONALD L. APPLBAUM, as President of Kean University and individually, FRANK J. ESPOSITO, as Interim President of Kean University and individually, KEAN FEDERATION OF TEACHERS, and COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

KENNETH A. GOLDBERG
GOLDBERG & FLIEGEL LLP
60 East 42nd Street, Suite 3421
New York, New York 10165
(212) 983-1077

JOEL BERGER*
360 Lexington Avenue, 16th Floor
New York, New York 10017-6502
(212) 687-4911

Attorneys for Petitioner Bruce M. Skoorka

* *Counsel of Record*

QUESTION PRESENTED

Whether a judgment based on a voluntary dismissal with prejudice should be regarded as appealable where, as here, Petitioner's solicitation of the dismissal was expressly designed for the stated purpose of expediting review of numerous orders which had eviscerated all of Petitioner's claims.

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PETITION FOR A WRIT OF CERTIORARI

Bruce M. Skoorka respectfully petitions that a Writ of Certiorari be issued to review the decision of the Supreme Court of New Jersey, entered on February 14, 2008 which denied a petition for certification of a judgment of the Appellate Division of New Jersey dated August 30, 2007.

OPINIONS BELOW

The Order of the Supreme Court of New Jersey is dated February 13, 2008. That Order was entered on February 14, 2008. The opinion of the Appellate Division of New Jersey is dated August 30, 2007.

JURISDICTION

The Order of the Supreme Court of New Jersey was entered on February 14, 2008. Pursuant to Rules 13 and 29 of this Court, this petition has been filed within 90 days of the entry of such Order. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which provides, in relevant part, "nor shall any State deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

Petitioner Dr. Bruce M. Skoorka , a professor at Kean University ("Kean") and a member of the Kean Federation of Teachers ("KFT" or the "Union"), filed a lawsuit against Kean, The State of New Jersey, the Board Of Trustees Of Kean, William M. Kempey, Ronald L. Applbaum and Frank J. Esposito ("State Respondents"), KFT and Council Of New Jersey State College Locals ("Union Respondents"), to remedy unlawful discrimination, harassment and retaliation. Petitioner alleged nine counts under the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. ("CEPA"), the New Jersey Law Against Discrimination, N.J.S.A. §§ 10:5-1 et seq. ("NJLAD"), the New Jersey Constitution and the United States Constitution. Several of Petitioner's claims involved allegations of criminal conduct yet were dismissed by the Trial Court on motions for summary judgment.

Dr. Skoorka is a highly qualified professor who joined Kean to teach, conduct research and work in a lawful and professional academic environment. He was appalled by unlawful and unethical religious and race discrimination, financial and political corruption, and violations of policy and procedure involving among others his Department Chairperson, Dr. Kempey. Dr. Skoorka reported the unlawful and unethical conduct, expecting Kean and the Union to remedy it. Instead, Respondents viciously retaliated against Dr. Skoorka on an ongoing and escalating basis since 1998, harassed him, and unlawfully denied him a promotion. There is voluminous

documentation, deposition testimony and other corroborating evidence establishing Petitioner's complaints and Respondents' unlawful conduct.

The Trial Court denied Petitioner relevant and material document discovery and depositions and granted Respondents' three motions for summary judgment (in 2004 and 2005), eviscerating virtually all of Petitioner's claims and dismissing virtually all Respondents. On October 17 and 18, 2005, Petitioner was forced to attend a futile trial and, when the Trial Court further eviscerated his remaining claims, Petitioner had no chance of recovery and was forced to take a voluntary dismissal with prejudice to expedite a global appeal. Petitioner clearly stated on the record that he was taking the dismissal for the express purpose of pursuing a global appeal. (A-65 to A-68.)

Petitioner then filed an appeal, seeking reversal of the Trial Court's Orders, including: (1) Order denying in part and granting in part State Respondents' Motion For Summary Judgment (March 30, 2005); (2) Order denying in part and granting in part State Respondents' Second Motion For Summary Judgment (July 6, 2005); (3) Order granting Union Respondents' Motion For Summary Judgment (September 24, 2004); (4) Orders refusing to allow Petitioner to add as a Defendant Dawood Farahi, President of Kean or to take the de bene esse deposition of material non-party witness Peter Ogar (an important union official), and denying Petitioner's motions to compel and denying Petitioner relevant documents and discovery; and (5) Order granting voluntary dismissal with prejudice (October 18, 2005). Petitioner also sought a change

of venue because of a substantial doubt that he can obtain a fair and impartial trial in Union County, New Jersey.

On August 30, 2007, the Appellate Division by Order (A-3 to A-61) granted in part and denied in part the appeal. The Appellate Division reversed the Trial Court's erroneous dismissals of Petitioner's claims under (1) the NJLAD for denial of promotion, (2) the First Amendment for injunctive relief against the Board for retaliation against Plaintiff for speaking on matters of public concern and exercising his right of petition, and (3) the Fourteenth Amendment Equal Protection Clause for religious discrimination. The Appellate Division reversed certain erroneous discovery rulings, stating that certain of those rulings resulted in "substantial injustice," (A-52 to A-60), but failed to reverse other erroneous rulings of the Trial Court and failed to order a change of venue.

Most importantly for purposes of this petition, the appellate court erroneously held that Petitioner could not reinstate his claims that had been dismissed at the time of trial to expedite his global appeal. Likewise, the Appellate Division held that because Petitioner voluntarily dismissed his remaining CEPA claims at trial, Plaintiff could not even reinstate those portions of the CEPA claims that had been erroneously dismissed by the Trial Court on motions for summary judgment. This ruling deprived Petitioner of Due Process of Law. It is at odds with the decisions of several other States, as well as several federal courts, that permit voluntary dismissals to enable timely and effective appellate review, and created a substantial injustice.

Petitioner filed a petition for certification to the Supreme Court of New Jersey, but the petition was summarily denied without explanation on February 14, 2008 (A-1).

REASONS FOR GRANTING THE PETITION

The petition should be granted.

The Appellate Division erred in holding that Petitioner was not entitled to appeal and seek reinstatement of the claims that were disposed of on October 18, 2005 by voluntary dismissal with prejudice, which dismissal was taken to expedite a global appeal of all claims.[1]

The claims covered by Petitioner's voluntary dismissal are appealable and can be reinstated. A judgment based on voluntary dismissal is regarded as involuntary and appealable where, as here, the plaintiff's solicitation of the dismissal was designed to expedite review of an order which had in effect dismissed plaintiff's claims. This Court and numerous lower federal courts have so held. U.S. v. Procter & Gamble Co., 356 U.S. 677, 680-681 (1958); John's Insulation, Inc. v. L. Addison & Assocs., Inc.,

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[1] Plaintiff sought an interlocutory appeal before the October 2005 trial. Both the Appellate Division and the New Jersey Supreme Court refused to hear an interlocutory appeal, even though there was ample precedent for hearing on appeal. Ruscki v. City of Bayonne, 356 N.J. Super. 166 (App. Div. 2002); Millbrook Tax Fund, Inc. v. P.L. Henry & Associates, Inc., 344 N.J. Super. 49 (App. Div. 2001); Blatterfein v. Larken Associates, 323 N.J. Super. 167 (App. Div. 1999); Housel v. Theodoridis, 314 N.J. Super. 597 (App. Div. 1998); Craig v. Suburban Cablevision, Inc., 274 N.J. Super. 303 (App. Div. 1994).

156 F.3d 101, 107 (1st Cir. 1998); Empire Trevino-Barton v. Pittsburgh Nat'l Bank, 919 F.2d 874, 878 (3d Cir. 1990); Empire Volkswagen Inc. v. Worldwide Volkswagen Corp., 814 F.2d 90, 94 (2d Cir. 1987); Bogorad v. Eli Lilly Co., 768 F.2d 93 (6th Cir. 1985); Raceway Properties, Inc. v. Emprise Corp., 613 F.2d 656, 657 (6th Cir. 1980).

So have numerous State courts. Sheets v. Knight, 308 Or. 220, 225-226, 779 P.2d 1000 (Sup. Ct. Or. 1989); Dong v. Board of Trustees of Leland Stanford Jr. University, 191 Cal. App.3d 1572, 1576-1577, 236 Cal. Rptr. 912 (Ct. App., of Cal., Sixth Dist. 1987), cert. denied 484 U.S. 1019 (1988); Cooper v. City of Fairhope, 263 Ala. 619, 621-622, 83 So.2d 321 (Ala. 1955); Rochlin v. P.S. West Const. Co., 234 N.C. 443, 444-445, 67 S.E.2d 464 (N.C. 1951); Barber v. Grand Summitt Mining Co., 11 Wash.2d 114, 119-121, 118 P.2d 773 (Wash. 1941); Boyd v. Logan Jones Dry Goods Co., 340 Mo. 1100, 1102-1103, 104 S.W.2d 346 (Mo. 1937).

The Trial Court eviscerated virtually all of Petitioner's claims on summary judgment motions and then effectively eviscerated the remaining claims by erroneously (a) excluding virtually all of Petitioner's causation and comparator evidence, and restricting the scope of testimony that Petitioner and other witnesses could provide, (b) precluding Petitioner from calling relevant witnesses, and (c) ruling that Respondents could introduce for all purposes evidence criticizing Petitioner on matters arising after Petitioner's two promotion applications had been denied and could argue — for the very first time and contrary to their prior admission — that Petitioner was not qualified for promotion.

The Trial Court also eviscerated Petitioner's claims for damages by erroneously granting Respondents' motions in limine to dismiss Petitioner's claims for punitive damages and to preclude evidence of Petitioner's emotional distress damages. In addition, prior to the trial, the Trial Court's erroneous discovery rulings caused Petitioner "substantial injustice." (A-52 to A-60).

On October 18, 2005, Petitioner was forced to take a voluntary dismissal with prejudice solely to expedite a global appeal of the numerous erroneous and prejudicial rulings made against him. In doing so, Petitioner made it clear to the Trial Court that he was expressly reserving his rights to seek a global appeal, i.e., an appeal of all erroneous rulings that had compelled him to take the dismissal. Petitioner stated: "It's my understanding I believe that the case will be futile on the judge's prior rulings and the rulings yesterday and today and I understand the ramifications and I reserve my appeal rights." (A-65.) Petitioner's counsel repeatedly stated that the voluntary dismissal was "with prejudice," leaving no doubt that it was being entered for the purpose of taking a global appeal. (A-67 to A-68, A-71 to A-73.)

Notwithstanding the above, the Appellate Division erroneously held that Petitioner's voluntary dismissal of claims precluded appeal and reinstatement of such claims, and thus the appellate court failed to consider the extreme circumstances that compelled the voluntary dismissal, and ignored relevant caselaw. The Appellate Division cited Winberry v. Salisbury 5 N.J. 240, cert. denied 340 U.S. 877 (1950), Bass v. DeVink, 336 N.J. Super. 450, 455 (App. Div.), cert. denied 168 N.J. 292 (2001),

DeAngelis v. Rose, 320 N.J. Super. 263 (App. Div. 1999), and Mack Auto Imports, Inc. v. Jaguar Cars, Inc., 244 N.J. Super 254 (App. Div. 1990). However, those cases do not validate the Appellate Division's ruling. (A-5, A-23 to A-25).

In Bass, the trial court stayed an action pending disposition of a related action in Delaware. Plaintiff sought and was granted dismissal of his complaint. Plaintiff then filed an appeal and the Appellate Division heard same. Thus, Bass does not support denying an appeal because the plaintiff merely sought dismissal of the complaint. Moreover, here, unlike Bass, plaintiff sought dismissal because the Trial Court's erroneous rulings eviscerated his claims.

In Winberry, the Court entered judgment for defendant in an initial order. In a subsequent order, consented to by plaintiff, the Court modified the judgment to relieve plaintiff from responsibility for costs. On appeal, the Court held that plaintiff, having failed to timely appeal the first order within 45 days, did not obtain a new 45 day period for appeal when the second order was made. Winberry, 5 N.J. 240, 255. Winberry did not involve a voluntary dismissal and is inapplicable. Moreover, here, unlike Winberry, Plaintiff timely filed his appeal.

In DeAngelis, the plaintiff brought a legal malpractice action. On the scheduled trial date the parties entered into a settlement agreement regarding a counterclaim and placed the settlement on the record, and several months later the court entered a consent order regarding same. 320 N.J. Super. at 266-67. The settlement provided that the

plaintiff could appeal the denial of several claims and, if he prevailed, the settlement as to the counterclaim would be vacated. Id. The plaintiff did not prevail on appeal, but nonetheless sought vacatur of the counterclaim judgment to which he had agreed in the settlement. The Appellate Division correctly held that under these circumstances the plaintiff could not appeal the consent order. 320 N.J. Super at 280-81. DeAngelis did not involve a voluntary dismissal with prejudice, and is inapplicable.

In Mack Auto Imports, the plaintiff sought voluntary dismissal solely due to adverse discovery orders. Here, Petitioner took a dismissal because the Trial Court effectively eviscerated Petitioner's remaining claims for liability and damages, and caused Petitioner to suffer "substantial injustice." The Appellate Division erred by failing to address the numerous cases from numerous jurisdictions cited by Petitioner supporting an appeal of claims disposed of by voluntary dismissal under the extreme and compelling circumstances of this case.

The Appellate Division's erroneous holding that Petitioner could not appeal and reinstate claims disposed of by voluntary dismissal led it to erroneously refuse to consider the Trial Court's prior erroneous rulings with respect to those claims on State Respondents' prior motions for summary judgment and motions at trial.

The Trial Court erred in granting State Respondents' second motion for summary judgment, virtually eliminating the CEPA claims. The Appellate Division then erred by failing to consider

those issues on appeal, stating that "Plaintiff voluntarily dismissed the CEPA count and therefore his objections to the judge's rulings are moot." (A-35). However, as noted above, the voluntary dismissal of claims in October 2005 does not and, as a matter of Due Process, should not bar a global appeal.

The Trial Court's July 2005 Order erroneously dismissed more than 20 separate and distinct CEPA claims. The dismissed CEPA claims included, among other items, claims of criminal conduct that had been perpetrated against Petitioner and claims of fraudulent conduct, all of which mandated a public hearing on the merits. Appeal of those claims should not be barred by the October 2005 dismissal.

The Appellate Division correctly held that the Trial Court erred in dismissing Petitioner's First Amendment Claim against Dr. Kempey with respect to Petitioner's speech on matters of public concern outside of race discrimination. However, the Appellate Division erroneously held that "because plaintiff voluntarily dismissed his First Amendment claim against Kempey, this claim only remains viable against the Board." (A-42 to A-44). Again, under the circumstances, the denial of an appeal — solely because of Petitioner's voluntary dismissal designed for the express purpose of taking a global appeal — deprived Petitioner of Due Process of law and reached a result that would not have been reached in many other jurisdictions.

CONCLUSION

The Court should issue a Writ of Certiorari to review the decision of the NJ Supreme Court entered on February 14, 2008 which denied a petition for certification of a judgment of the Appellate Division dated August 30, 2007.

Dated: May 12, 2008

KENNETH A. GOLDBERG
GOLDBERG & FLIEGEL LLP
60 East 42nd Street, Suite 3421
New York, New York 10165
(212) 983-1077

JOEL BERGER*
360 Lexington Avenue, 16th Floor
New York, New York 10017-6502
(212) 687-4911

Attorneys for Petitioner
Bruce M. Skoorka

* *Counsel of Record*

APPENDIX

SUPREME COURT OF NEW JERSEY
C-498 September Term 2007
61, 781

BRUCE SKOORKA,

Plaintiff-Petitioner,

v.

KEAN UNIVERSITY, et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

FILED
FEB 14 2008
/s/
CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1654-05 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Virginia A. Long, Presiding Justice, at Trenton, this 13th day of February, 2008.

The foregoing is a true copy
of the original on file in my office.

/s/

CLERK OF THE SUPREME COURT
OF NEW JERSEY

/s/

CLERK OF THE SUPREME COURT

A-2 Not Available

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1654-05T5

BRUCE M. SKOORKA,

Plaintiff-Appellant,

v.

KEAN UNIVERSITY, THE STATE OF NEW JERSEY, THE BOARD OF TRUSTEES OF KEAN UNIVERSITY, WILLIAM M. KEMPEY, officially and individually, RONALD L. APPLBAUM, as President of Kean University and individually, FRANK J. ESPOSITO, as Interim President of Kean University and individually, KEAN FEDERATION OF TEACHERS, and COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS,

Defendants-Respondents.

Argued January 10, 2007 – Decided August 30, 2007

Before Judges Lefelt, Parrillo and Sapp-Peterson.

On appeal from the Superior Court of New Jersey, Law Division, Union County, L-5247-01.

Kenneth A. Goldberg (Goldberg & Fliegel) of the New York bar, admitted pro hac vice, argued the cause for appellant (Robert G. Stahl and Mr. Goldberg, attorneys; Mr. Goldberg, of counsel and on the brief).

Joseph M. Micheletti, Deputy Attorney General, argued the cause for respondents Kean University, The State of New Jersey, The Board of Trustees of Kean University, William M. Kempey, Ronald L. Applbaum, and Frank J. Esposito (Stuart Rabner, Attorney General, attorney; Patrick DeAlmeida, Assistant Attorney General, of counsel; Marisa Koz and Mr. Micheletti, Deputy Attorneys General, on the brief).

PER CURIAM

Plaintiff John Skoorka is a tenured college professor. Plaintiff filed a complaint against defendants, Kean University (Kean), the State of New Jersey, the Board of Trustees (Board), Dr. William Kempey (Kempey), Dr. Ronald L. Applbaum (Applbaum) and Dr. Frank J. Esposito (Esposito) (collectively referred to as the State), the Kean Federation of Teachers (Union), and the Council of New Jersey State College Locals (State Council) alleging that because he (1) is Jewish, (2) objected to racial discrimination against a former colleague and disclosed or objected to other improper conduct, (3) filed a grievance and an affirmative action (AA) complaint, and (4) filed the present complaint, he was denied promotion to associate professor and subjected to a hostile work environment, contrary to the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49; the Conscientious Employee's Protection Act (CEPA), N.J.S.A. 34:19-1 to -8; and the New Jersey and Federal Constitutions.

Plaintiff appeals from various orders entered by the motion judge granting partial summary judgment to defendants and denying plaintiff's pretrial discovery motions and motion for leave to file an amended complaint. Plaintiff also challenges the trial judge's rulings, at trial and on in limine motions, which plaintiff argues led to his voluntary dismissal of the remaining claims.

We reverse the motion judge's dismissal of plaintiff's religious discrimination claims brought under the LAD and the First Amendment and plaintiff's claim for injunctive relief pursuant to 42 U.S.C. § 1983 asserted against the Board. We also reverse two pretrial discovery orders denying plaintiff's motion to reopen discovery to depose the union representative, Dr. Peter Ogar (Ogar), and denying plaintiff access to personnel files of certain faculty members. In all other respects, we affirm the orders entered May 28, 2004, July 9, 2004, September 24, 2004, March 18, 2005, March 30, 2005, July 6, 2005, and October 17 and 18, 2005.

The salient facts, as gleaned from the record, commenced in 1995 when plaintiff met and interviewed with Kempey, Chairman of the Economics and Finance Department at Kean. Plaintiff was subsequently hired in 1996 as an assistant professor in Kempey's department. Over the next two years, plaintiff received favorable yearly evaluations from Kempey and from his colleagues and students who evaluated him.

In April 1998, Kempey's evaluation was not as positive as it had been in previous years and the student evaluations rated plaintiff at mid-range.

In 1999, Kempey once again found plaintiff's teaching deficient. Kempey reported that plaintiff was late for class and exhibited a negative attitude towards students. Plaintiff complained that Kempey's evaluations were false, malicious, and in retaliation for his support of Dr. Peter Jackson (Jackson), an African-American colleague against whom plaintiff claimed Kempey engaged in racial discrimination.

Plaintiff's intervention in the Kempey/Jackson matter first occurred during the 1997-1998 school term. Plaintiff reported to Charles Anderson (Anderson), the Dean of the School of Business and Public Administration,[1] that he believed Kempey was engaging in racial discrimination directed toward Jackson, with whom plaintiff shared office space. After doing so, plaintiff alleges that Kempey commenced to engage in retaliatory and discriminatory conduct directed towards him and created a hostile work environment.

During this same time period and continuing into February 1999, plaintiff complained to Anderson, as well as to the University Provost Livingston Alexander (Alexander), Union President Richard Katz (Katz), and Ogar, that Kempey was misappropriating Economics Department funds for his personal use. Skoorka based this claim on the fact that there were no office supplies, copiers, printers, and secretarial support. Plaintiff claims Anderson told him "that he was getting nowhere on those issues."

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[1] Formerly known as the School of Business and Government Technology.

In either February 1999 or the Fall of 1999, plaintiff and his department colleagues, Dr. Carol Condon (Condon), Dr. Youn- Suk Kim (Kim), and Dr. Eufronio Carreno (Carreno), had a luncheon discussion during which they discussed, among other topics, exclusion of faculty from hiring decisions, secrecy of the department budget, lack of access to office equipment, supplies and services, and the lack of department meetings. Plaintiff was asked to take notes, and at the conclusion of the meeting, placed copies of the memo he prepared in the mailboxes of those present at the discussion. Carreno, who at the time was due for a post-tenure review, removed the memos from the mailboxes and admonished plaintiff for distributing the notices.

On his first day back for the Fall 1999 semester, plaintiff complained to Katz, Ogar, and Anderson about Kempey's peer review of his retention and tenure package. Ogar agreed that Kempey's peer review should be removed from plaintiff's file. Soon after, Katz told plaintiff that he would not intervene, and Anderson informed plaintiff that the Union was adamant "to thwart any effort to remove Dr. Kempey's peer review."

In a September 1999 memo to his department's Appointment, Retention, Tenure and Promotion (ARTP) Committee and in an October 1999 memo to Anderson, plaintiff protested the inclusion of Kempey's September 2, 1999 peer review in his file. Plaintiff contended that he had the right to choose his evaluators. Plaintiff also objected to the composition of the ARTP Committee and to Kempey's unilateral appointment of a student to sit on the committee.

Plaintiff complained to Katz, who plaintiff contends did nothing, and to Ogar, who, according to plaintiff, attempted to address it, but Katz reportedly told Ogar "to stay out of it." Katz informed plaintiff that "whatever Kempey wants to do he is not going to intervene. It's an internal matter and it's Kempey's prerogative." Katz also told plaintiff that he (Katz) would not "allow Dean Anderson to tell Kempey what to do."

Anderson, aware of the student appointment to the ARTP Committee, consulted Patrick Polito, Dean of Students, who had no answer. Anderson concluded that there was no official policy and "left it at that." Anderson told plaintiff that "he [Anderson] can't win on this with the union." Plaintiff was retained for the upcoming academic year.

On March 13, 2000, plaintiff wrote a memo to Anderson complaining that Kempey falsely accused him of missing class. Plaintiff explained that some students did not know where the class was meeting. Plaintiff also complained that Kempey was harassing him. On April 20, 2000, plaintiff wrote to Anderson and Katz protesting the absence of uniform, written procedures for the ARTP process in his department, as required by the "University Guidelines."

In the Fall of 2000, plaintiff complained to Anderson that Kempey was "targeting" him for several reasons, including religion. Apparently, after the ARTP voted not to recommend plaintiff for retention and tenure, Anderson found Kempey in his office allegedly altering plaintiff's promotion application. Anderson considered Kempey's conduct a "grave matter" and returned plaintiff's file to the

ARTP Committee because he no longer had confidence that the evaluation process had been unbiased. Anderson also reported the incident to Katz, Alexander, and Applbaum.

Both Alexander and Applbaum agreed that Kempey violated Kean procedures by accessing plaintiff's file, but no action was taken against Kempey other than a letter of reprimand. Alexander asked Anderson to work with the Union to rectify the situation and to ensure that it would not happen again. In a written memo to the Union, Anderson asked that a union representative be present during the ARTP's next deliberation on plaintiff's application for tenure.

Plaintiff submitted "a restored version" of his application to the ARTP Committee on October 5, 2000, and on October 10, after excluding the union representative and after Condon, a committee member, "stormed out," the remaining committee members, Kempey, Dr. Henry Saffer (Saffer), and Carreno, did not recommend plaintiff for retention and tenure. Despite the committee's vote, Applbaum notified plaintiff on December 13, 2000, that the Board had reappointed him for the 2001-02 academic term, and awarded him tenure effective the 2001-02 academic year.

In addition to seeking retention and tenure in 2000, plaintiff also sought promotion to the position of associate professor. The criteria for promotion to associate professor were mastery of the subject matter, continuing growth, effectiveness in teaching and community service, and scholarly ability.

Plaintiff followed Kean's protocol for promotion applications. He first submitted the application to the ARTP Committee, headed by Kempey, as department chair. The ARTP Committee initially rejected plaintiff's application as untimely, but later, at the direction of the University Promotion Committee (UPC), accepted the application for consideration and voted not to recommend plaintiff for promotion. The application was then considered by the UPC, which determined that plaintiff was qualified for promotion but did not rank him among the top one-third of promotion-eligible candidates. Applbaum reviewed the UPC recommendation and advised plaintiff, in a letter dated January 12, 2001, that he would "not be nominating [plaintiff] for promotion to the Board of Trustees for the 2001-02 academic year," stating that although the UPC recommended plaintiff for promotion, they did not rank his application "among the top third of 23 candidates."

In a letter dated January 8, 2001,[2] plaintiff filed an affirmative action (AA) complaint against Kempey with the Union and, three days later, with Kean's Director of Affirmative Action, Carlos Rivera (Rivera). The grievance and complaint consisted of eleven to thirteen "items," including an accusation that Kempey illegally entered Anderson's private office in order to alter plaintiff's confidential file, discriminated against plaintiff in the promotion process, and engaged in improper quid pro quo

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[2] The letter is mistakenly dated January 8, 2000.

arrangements with faculty. Plaintiff amended his AA complaint in April 2001 to allege racial and religious discrimination.

Although the union grievance officer, Dr. Michael Israel (Israel), wanted to assist plaintiff with his grievance, Katz declined the offer and instead determined to forward the matter to the State Council, which recommended that plaintiff not file a formal grievance. The State Council advised plaintiff, in a letter dated February 2, 2001, that his complaints related to his tenure application were moot because he had been awarded tenure in December 2000, effective academic year 2001-2002, his complaints about business economic concentrations were "academic matters beyond the purview of the Union" and that his harassment complaints were untimely because they had occurred during the previous semester. In addition, the State Council advised plaintiff that it had been assured by Kean that plaintiff's complaint would be investigated.

The AA complaint was investigated and the report issued on July 26, 2001. Among the findings, the report credited plaintiff's allegations that Kempey improperly tampered with plaintiff's retention and tenure file, that Kempey's department had no written procedures for evaluating candidates for retention, although required to do so by Kean, and that Kempey had not taught in the classroom for several years, was generally unavailable, and did not represent the department at Kean programs. As to plaintiff's claims of religious and racial

discrimination, the report did not substantiate the claims, but concluded that a pattern of behavior was suggested and warranted close monitoring.

In response to the report, Applbaum notified Kempey and Skoorka that based upon the report's findings, there was insufficient evidence of a violation of Kean's institutional policy against discrimination in the workplace and that the managerial issues raised in the complaint were being referred to the "appropriate University personnel for review and assessment."

Plaintiff then submitted his second application for promotion in the Fall of 2001. Plaintiff asked that a special committee be appointed to review his application because he believed Kempey would not impartially evaluate his application in light of the grievance and AA complaint he had filed. Plaintiff also expressed the belief that Kempey was continuing to engage in discriminatory and harassing conduct towards him. Plaintiff's request was granted. Dr. Patrick Coughlin, a professor of management, was appointed to chair the committee, which also consisted of Condon, Kim, Saffer, and Carreno. Saffer and Carreno boycotted the meeting, while the remaining three members voted in favor of plaintiff's promotion. The UPC once again determined that plaintiff was qualified for promotion but did not rank him in the top one-third of promotion-eligible candidates.

Applbaum notified plaintiff, in a letter dated January 11, 2002, that he was not recommending plaintiff for promotion. In his written request for reconsideration, plaintiff advised Applbaum that, in

his opinion, he was "fully, not minimally, qualified for promotion to Associate Professor," that less qualified candidates were recommended for promotion, and that the committee's failure to rank his application among the top third and Applbaum's refusal to nominate him for promotion were part of ongoing harassment, discrimination, and retaliation. In a letter dated February 4, 2002, Applbaum responded by informing plaintiff that he had reviewed plaintiff's promotional file and concluded that although plaintiff was qualified, his "record on a comparative basis across the five criteria matched against the pool of candidates [did] not warrant nomination for promotion at this time."

In November 2001, prior to this decision on his promotion application, plaintiff had filed a nine-count complaint against defendants. In the complaint plaintiff alleged: (1) denial of promotion in retaliation for his complaints, contrary to CEPA (Count One); (2) religious discrimination contrary to the LAD (Count Two); (3) retaliation for objecting to improper conduct, contrary to the LAD (Count Three); (4) retaliation for speaking out on matters of public concern, contrary to the New Jersey Constitution (Count Four) and the First Amendment (Count Seven); (5) violation of his right of assembly and petition under the New Jersey Constitution (Count Five) and his right of petition under the First Amendment (Count Eight); (6) denial of due process and equal protection under the New Jersey Constitution (Count Six) and the United States Constitution (Count Nine).

The complaint was amended in December 2002 to add Frank J. Esposito, the interim university president, as a defendant. In an order dated July 7, 2004 the court permitted plaintiff to amend the complaint to add new allegations, but denied plaintiff's request to add an additional defendant, the new president, Dawood Farahi (Farahi).

The acts of retaliation, discrimination, and hostile work environment set forth in the complaint include (1) Kempey defaming and harassing plaintiff, instigating false student complaints against him, vandalizing his office, making improper visits to his classes, abusing him in the presence of students, falsely criticizing him in evaluations, preventing him from serving on committees, illegally entering the dean's office and altering his application for retention and tenure, interfering in his outside employment endeavors, causing an audit of his income tax returns, inscribing anti-Semitic remarks on his automobile, and misappropriation of department funds; (2) the hiring and retaining of unqualified professors while plaintiff's promotion to associate professor was twice denied; (3) defendants' refusal to properly investigate his complaints about Kempey or giving short shrift to his allegations; and (4) the Union's refusal to afford him a union representative while providing such representation to Kempey and other non-Jewish faculty, and the Union's failure to otherwise support his claims.

In September 2004, the court granted partial summary judgment dismissing plaintiff's claims against the Union. The motion judge determined that for purposes of CEPA, the Union was not plaintiff's employer, it did not act in the interest of

Kean or with Kean's consent, and it did not represent Kempey. The motion judge also found that plaintiff's claim that the Union conspired with Kean to engage in retaliatory actions against plaintiff lacked evidentiary support.

As to plaintiff's LAD claims against the Union, the motion judge found a deficient factual basis for plaintiff's religious discrimination claims. The judge observed that plaintiff identified several non-Jewish persons, including Kempey, who were afforded union representation in connection with disputes, but noted that plaintiff did not specify the factual background surrounding the representation, including whether the circumstances were similar to the circumstances under which plaintiff sought union representation. The judge concluded that the fact that the Union represented Kempey and not plaintiff, as well as the fact that there was evidence that the Union represented members in conflicting positions, was not evidence that its failure to represent plaintiff was because he was Jewish.

Finally, the motion judge rejected plaintiff's constitutional claims against the Union because it found that the Union is a private entity rather than a state actor. Further, the judge reasoned there was no basis to maintain a cause of action against the Union based upon a conspiracy theory because plaintiff presented insufficient evidence of a conspiracy.

In March 2005, the court granted the State's motion for partial summary judgment dismissing those claims alleging violation of the New Jersey Constitution and the LAD, which the court concluded

were preempted by CEPA. On July 6, 2005, the court entered a second partial summary judgment order dismissing most of plaintiff's CEPA allegations, ruling that the incidents about which plaintiff complained or objected to were "mere complaints by an individual" that did not implicate CEPA, legislation which the judge reasoned was not intended to provide a remedy for employees who simply disagree with entirely lawful decisions of an employer.

Following the entry of the second partial summary judgment order, trial commenced October 17, 2005, with the court considering in limine motions from the parties. On October 17 and 18, 2005, the court entered orders that dismissed plaintiff's punitive damages claims and limited the scope of admissible evidence.

After the court's ruling on these in limine motions, plaintiff advised the court that he was voluntarily dismissing the remaining claims, as he believed the court's evidentiary rulings eviscerated his case. The following colloquy occurred:

> THE COURT: Okay. [Plaintiff], at this point, you're making a legal judgment call as to how to handle your matter. You could go forward to trial with some pretty damaging rulings from the previous case from [the motion judge] or it's my understanding that you don't wish to go forward the way the case looks now. You want to dismiss this case and I gather take an appeal of [the motion judge's] rulings and depending on what happens then, perhaps we'll see you again

based upon [the motion judge] having made errors in his rulings. Is that your understanding of what we're doing?

[PLAINTIFF]: It's my understanding I believe that the case will be futile on the judge[']s prior rulings and the rulings yesterday and today and I understand the ramifications and I reserve my appeal rights.

THE COURT: All right. Nobody's forcing you to do this?

[PLAINTIFF]: Nobody's forcing me to do this. I see it as my only option at this point.

THE COURT: Okay and we had a short colloquy on the record on the 10th floor while you were on the first floor and your attorneys caught you up on that and told you what happened with regard to that this morning?

[PLAINTIFF'S COUNSEL]: The evidentiary rulings this morning.

[PLAINTIFF]: Yes.

THE COURT: Okay. You don't feel under any kind of pressure other than the pressure anyone would feel under a lawsuit[;] is that . . . correct?

[PLAINTIFF]: Any pressure to do what I'm doing now?

THE COURT: To do what you're doing, yes.

[PLAINTIFF]: No, I don't feel pressure to do what I'm doing now. It would be futile to continue at this point.

THE COURT: All right. That's a — counsel, any questions?

[DEFENSE COUNSEL]: I'm duty bound, I have to, Your Honor. In terms of reserving appeal rights, I don't know the effect of a voluntary dismissal on those appeals.

THE COURT: I don't either and I don't give legal advice, so .. he makes a good point. I don't know ... where you are in the appeal process. I don't know what your dates are, when you can file things. I don't know and I'm not making any representation as to that. You're dealing with your attorneys on ... the dates of appeal, et cetera. You understand that?

[PLAINTIFF]: Yes.

THE COURT: It's a ... technical issue as to when you can file them and neither the State nor I are telling you — giving you any advice with regard to that. You rely on your attorneys. Is that correct?

[PLAINTIFF]: That's correct.

The present appeal followed. On appeal plaintiff raises the following points for our consideration:

POINT ONE

THE TRIAL COURT ERRED IN GRANTING STATE DEFENDANTS' FIRST MOTION FOR SUMMARY JUDGMENT ON THE NJLAD AND N.J. CONSTITUTION CLAIMS.

POINT TWO

THE TRIAL COURT ERRED IN ALLOWING STATE DEFENDANTS TO BRING A SECOND MOTION FOR SUMMARY JUDGMENT.

POINT THREE

THE TRIAL COURT ERRED IN GRANTING STATE DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT VIRTUALLY ELIMINATING THE CEPA CLAIMS.

POINT FOUR

THE TRIAL COURT ERRED IN GRANTING STATE DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT THAT DEFENDANTS ARE NOT PERSONS UNDER § 1983.

POINT FIVE

THE TRIAL COURT ERRED IN GRANTING STATE DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT REGARDING STATEMENTS OF PUBLIC CONCERN.

POINT SIX

THE TRIAL COURT ERRED IN GRANTING STATE DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT REGARDING THE RIGHT TO PETITION CLAIM.

POINT SEVEN

THE TRIAL COURT ERRED IN GRANTING STATE DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S DUE PROCESS CLAIM.

POINT EIGHT

THE TRIAL COURT ERRED IN GRANTING UNION DEFENDANTS' MOTION REGARDING COUNT ONE OF THE COMPLAINT UNDER CEPA.

POINT NINE

THE TRIAL COURT ERRED IN GRANTING UNION DEFENDANTS' MOTION REGARDING PLAINTIFF'S CLAIMS UNDER THE NJLAD.

POINT TEN

THE TRIAL COURT ERRED IN GRANTING UNION DEFENDANTS' MOTION REGARDING PLAINTIFF'S CLAIMS UNDER THE N.J./U.S. CONSTITUTION.

POINT ELEVEN

THE TRIAL COURT MIS-STATED THE FACTS ON UNION DEFENDANTS' MOTION.

POINT TWELVE

STATE DEFENDANTS ENGAGED IN EVIDENCE SPOLIATION.

A. Evidence Spoliation Is Sanctionable Conduct.

B. As Early As 1999 Defendants Knew This Lawsuit Would Be Filed.

C. Evidence Spoliation Regarding Carlos Rivera's Notes.

D. Evidence Spoliation Regarding Promotion Records.

POINT THIRTEEN

THE TRIAL COURT ERRED BY DENYING PLAINTIFF'S MOTION TO TAKE THE DE BENE ESSE DEPOSITION OF OUT-OF-STATE WITNESS PETER OGAR.

POINT FOURTEEN

THE TRIAL COURT ERRED BY DENYING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT TO ADD AS A DEFENDANT DAWOOD FARAHI, KEAN'S PRESIDENT.

POINT FIFTEEN

THE TRIAL COURT ERRED IN DENYING PLAINTIFF RELEVANT DISCOVERY.

POINT SIXTEEN

PLAINTIFF IS ENTITLED TO APPEAL THE CLAIMS THAT WERE DISPOSED OF ON OCTOBER 18, 2005 BY VOLUNTARY DISMISSAL WITH PREJUDICE.

A. The Standard For Appealing From A Voluntary Dismissal.

B. The Trial Court Eviscerated Plaintiff's Remaining Claims.

   1. Defendants' Motion As to "Dismissed Claims."

   2. Defendants' Evidence That Plaintiff Was Not Qualified.

   3. Post-January 2002 Incidents/Events and Evidence Falsely Criticizing Plaintiff On Irrelevant Matters.

   4. Evidence Regarding Witness Peter Ogar.

C. The Trial Court Eviscerated Plaintiff's Damages.

   1. Punitive Damages.

   2. Emotional Distress Damages.

POINT SEVENTEEN

THE VENUE OF THIS ACTION SHOULD BE MOVED TO ANOTHER COUNTY.

I.

We first address whether plaintiff's voluntary dismissal of his CEPA and First Amendment retaliation claims are reviewable despite plaintiff's voluntary dismissal of them solely to expedite and ensure our review of various pretrial and in limine rulings that he asserts effectively eliminated his ability to try the CEPA and retaliation claims.

By the time of trial, the claims that remained viable were (1) plaintiff's First Amendment claims against Kempey that he was not promoted in retaliation for reporting "racial discrimination against Dr. Peter Jackson . . . in the fall of the 1997/98 academic year"; and (2) his CEPA claim alleging "retaliatory failure to promote, for plaintiff allegedly: (a) reporting racial discrimination against Dr. Peter Jackson, allegedly made to Dean Charles Anderson in the fall of the 1997/98 academic year; (b) reporting, in a letter dated April 16, 2001, that Dr. Kempey discriminated against plaintiff because of his religion; and, (c) for filing the Complaint in this Action on November 29, 2001[.]"

Plaintiff contends he voluntarily dismissed these claims solely to expedite a review of rulings by the trial court and motion judge that effectively thwarted his ability to proceed to trial on the claims that remained following the court's decisions on the summary judgment motions. Defendants urge the court to reject this position, as a party may not appeal from a voluntary dismissal. Additionally, they contend that the issue raised in the claims plaintiff voluntarily dismissed is, at its core, the same issue plaintiff has pled from the outset; namely, whether

his promotion denial was for improper retaliatory motives. As such, defendants reason that plaintiff's act of voluntarily dismissing the complaint at trial has ended the matter.

In Winberry v. Salisbury, 5 N.J. 240, cert. denied, 340 U.S. 877, 71 S. Ct. 123, 95 L. Ed. 638 (1950), the Court stated that an order "consented to by the attorneys for each party" is not subject to appeal. Id. at 255. In Mack Auto Imports, Inc. v. Jaguar Cars, Inc., 244 N.J. Super. 254 (App. Div. 1990), the plaintiff, deeming its discovery inadequate and attempting to establish the required finality to appeal the adverse discovery rulings, voluntarily accepted a dismissal of its claim with prejudice. Id. at 257. We held that because the purpose of discovery is to prepare for trial, and since there would be no trial as a result of the voluntary dismissal, discovery issues were moot on appeal. Ibid. Moreover, we viewed the plaintiff's maneuver, in taking a voluntary dismissal and then appealing the prior discovery rulings, as an evasion of the rule against interlocutory appeals. Ibid.

Here as well, because plaintiff voluntarily dismissed his CEPA claim and his First Amendment free speech claim, those claims are not subject to reinstatement based upon plaintiff's appeal of the evidentiary rulings that, according to plaintiff, prompted the voluntary dismissal. See Bass v. DeVink, 336 N.J. Super. 450, 455 (App. Div.) ("It is axiomatic . . . that a party cannot appeal from a judgment or order to which he consented."), certif. denied, 168 N.J. 292 (2001); DeAngelis v. Rose, 320 N.J. Super. 263, 281 (App. Div. 1999) (plaintiff may not appeal from order confirming settlement).

Therefore, plaintiff may not reinstate either his CEPA claim (Count One) or, as to defendant Kempey, his First Amendment retaliation claims (Counts Seven and Eight).

However, contrary to defendants' contentions, not all of the claims plaintiff voluntarily dismissed are the exact same claims dismissed on summary judgment. The court in its summary judgment orders dismissed plaintiff's LAD and New Jersey Constitutional claims, as well as the First Amendment (speech and petition) and Fourteenth Amendment (due process and equal protection) claims plaintiff brought against the remaining defendants pursuant to 42 U.S.C. § 1983. Plaintiff is not precluded from pursuing an appeal of those claims that were dismissed by the court before plaintiff took his voluntary dismissal. See DeAngelis, supra, 320 N.J. Super. at 273-80 (where the plaintiff was allowed to appeal the counts of his complaint that were dismissed by summary judgment, despite having consented to the dismissal of other counts).

II.

We next address the court's September 24, 2004, March 30, 2005, and July 6, 2005 partial summary judgment orders. Our discussion begins with a reiteration of the basic principles of appellate review. The standard of review of a trial court's grant of summary judgment is the same as that employed by the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Summary judgment is appropriate where there is no genuine issue as to any material fact challenged. R. 4:46-2(c). The

ultimate question in a summary judgment motion is whether, upon a review of the pleadings, deposition testimony and other competent evidence presented in a light most favorable to the non-moving party, a rational fact-finder could resolve the alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

A. The September 24, 2004 Partial Summary Judgment Order

Plaintiff contends that the judge improperly dismissed his claims against the Union. He asserts that the judge erred in determining that (1) the Union was not plaintiff's employer and thus not liable under CEPA, (2) plaintiff failed to adequately address his LAD discrimination claim against the Union, and (3) the Union was not a state actor under 42 U.S.C. § 1983 and thus not liable on plaintiff's state and federal constitutional claims. Plaintiff also complains that the judge misstated some facts related to the Union in his decision.

At the time the court considered the summary judgment motion, discovery, as extended, had ended. The judge found plaintiff's conspiracy accusation, namely, that the Union acted in concert with Kean, without evidential support. The judge thus granted the Union's motion to dismiss plaintiff's CEPA claim against it.

CEPA includes, in its definition of employer, "any person or group of persons acting directly or indirectly on behalf of or in the interest of an employer with the employer's consent[.]" N.J.S.A. 34:19-2(a). Plaintiff failed to present any evidence

that the Union acted on behalf of or in the interest of Kean or with Kean's consent. Therefore, the judge properly rejected this claim.

Plaintiff next contends that he established a conspiracy between the Union and Kean to violate his rights. He cites as examples the Union's refusal to take steps to abate the unlawful conduct perpetrated against plaintiff, its refusal to pursue his grievance, and its refusal to permit Ogar to represent him.

"A civil conspiracy is a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties" to injure another, and "an overt act that results in damage." Morgan v. Union County Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364 (App. Div. 1993) (quoting Rotermund v. U.S. Steel Corp., 474 F.2d 1139, 1145 (8th Cir. 1973)), certif. denied, 135 N.J. 468 (1994) (internal quotations omitted). It is not necessary that a party produce direct evidence of a conspiracy, and "[t]he unlawful agreement need not be express." Id. at 365. The conspirators need not know the details of the plan, just its essential nature and general scope. Ibid.

Here, there is no evidence that any of the defendants or union representatives, other than Kempey, planned or intended to harm plaintiff, or that a union representative entered into an agreement with an administration or faculty member to harm plaintiff. The Union's refusal to pursue plaintiff's grievance, representation of Kempey in defense of plaintiff's AA complaint while failing to

offer to represent plaintiff, and preventing Ogar from representing plaintiff (assuming that occurred), were harmful to plaintiff, but there was no evidence that these actions or failures to act were undertaken in concert as part of defendant's plan to injure plaintiff.

Plaintiff's assertion that Anderson succumbed to union dominance is not supported by any evidence. Anderson expressed concerns about how the Union addressed the exclusion of its representative from the ARTP Committee evaluating plaintiff's retention and tenure application in 2000. That he was unable to force the Union to permit one of its representatives to participate in the evaluation may be evidence that Anderson was ineffective against the Union, but is not, without more, evidence of a conspiracy. Nor did plaintiff present competent evidence that the Union blocked discipline of Kempey for improperly entering Anderson's office.

The judge found a deficient factual basis for plaintiff's religions discrimination claim against the Union. The judge noted that plaintiff pointed out "several non-Jewish persons gaining [u]nion representation," but failed to discuss "the circumstances surrounding them." The judge reasoned that although the Union represented Kempey and the Union had previously represented members in conflicting positions, there was no evidence that its failure to represent plaintiff was based on his religion.

The LAD prohibits a labor organization from discriminating against any of its members because of the member's creed. N.J.S.A. 10:5-12(b). A plaintiff asserting a discrimination claim against a union

under the LAD, like an employee asserting a discrimination claim against an employer, must establish a prima facie case and then, if the union submits a legitimate, non-discriminatory reason for its action, the plaintiff must show that the reason was a pretext for unlawful discrimination. Lawson v. Passaic County & Vicinity Carpenters & Millwrights Local 124, 50 Fed. Appx. 73, 77 (3d Cir. 2002).

Plaintiff complains about "favoritism of non-Jewish members in grievances and arbitration" and names three individuals whom the Union apparently represented in grievances and arbitration. Plaintiff also cites as discriminatory the Union's representation of Kempey, apparently in defense of plaintiff's AA complaint.

Assuming that plaintiff has established a prima facie case, he has not submitted any evidence to refute the Union's legitimate, non-discriminatory explanations for its actions. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 449-50 (2005). Regarding Israel's defense of Kempey against plaintiff's complaint, during his deposition, Katz explained that at the local level, the Union would not have represented plaintiff "because he was the complaining party," but if plaintiff had requested representation in the dispute, the State Council would have provided it, although there is nothing in writing requiring such representation. Moreover, the State Council, in its February 2, 2001 letter to plaintiff, gave reasons why it was inappropriate for the Union to pursue portions of his grievance, and noted that Kean assured the Union that it would investigate plaintiff's identical

AA complaint, which it did. Plaintiff did not refute any of these explanations or submit any evidence to undermine them.

Likewise, the motion judge properly rejected plaintiff's constitutional claims against the Union because it is a private entity, not a state actor. See Barr v. Camelot Forest Conservation Ass'n, 153 Fed. Appx. 860, 862 (3d Cir. 2005) (finding that § 1983 and constitutional claims against an association were dismissed because the association was not a state actor), cert. denied, ____ U.S. ____, 126 S. Ct. 286, 165 L. Ed. 2d 896 (2006); Downey v. Coalition Against Rape & Abuse, Inc., 143 F. Supp. 2d 423, 437-38 (D.N.J. 2001) (holding that the Fourteenth Amendment's state action requirement applies to any claim brought under § 1983 and that a federal claim fails if private conduct caused the deprivation at issue); see also State v. Schmid, 84 N.J. 535, 545 (1980) (holding that "[t]here must be demonstrated a 'sufficiently close nexus' between the state regulation and the allegedly unconstitutional actions of the regulated business entity before it can be said that those actions emanate from or can be attributed to state government"); cf. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171, 92 S. Ct. 1965, 1970, 32 L. Ed. 2d 267, 636-67 (1972) (holding Equal Protection Clause of Fourteenth Amendment did not apply to a private club because state's regulation of club's liquor license did not directly involve state in club's racially exclusive practice).

B. The March 30, 2005 Summary Judgment Order

Plaintiff contends that the judge erred in granting the State's first motion for summary judgment on the basis that plaintiff's LAD and New Jersey constitutional claims were waived under CEPA. The motion judge agreed with the State that the underlying conduct forming the basis of plaintiff's LAD and New Jersey constitutional claims arose out of the same retaliatory conduct alleged in the CEPA claim. Plaintiff argues that his LAD and CEPA claims are substantially independent of each other.

N.J.S.A. 34:19-8 provides that "the institution of an action [under CEPA] shall be deemed a waiver of the rights and remedies available under any other . . . State law[.]" In Young v. Schering Corp. (Young II), 141 N.J. 16, 29 (1995), the Court held "the waiver provision applies only to those causes of action that require a finding of retaliatory conduct that is actionable under CEPA. The waiver exception does not apply to those causes of action that are substantially independent of the CEPA claim." Ibid. The Court concluded that by alleging retaliatory discharge under CEPA, the plaintiff did not waive his claims for severance pay, defamation, and malicious interference with prospective employment opportunities because those claims required "different proofs than those required to sustain the CEPA claim." Id. at 32 (quoting Young v. Schering Corp. (Young I), 275 N.J. Super. 221, 239 (App. Div. 1994), aff'd, 141 N.J. 16 (1995)). See Casper v. Paine Webber Group, Inc., 787 F. Supp. 1480, 1509 (D.N.J. 1992).

We agree that the portion of plaintiff's claim in Count Three alleging that, contrary to the LAD, he was subjected to retaliation because he "opposed, objected to and complained about Defendants' unlawful employment practices and unlawful discrimination," is subject to the CEPA waiver provisions. Young II, supra, 141 N.J. at 29. Plaintiff, however, alleges religious discrimination and hostile work environment under the LAD (Counts Two and Three), which do not require the same proofs necessary to establish a CEPA violation. See El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 178 (App. Div. 2005); Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 377 (Law Div. 2002), aff'd, 362 N.J. Super. 245 (App. Div.), certif. denied, 178 N.J. 32 (2003). See also Falco v. Cmty. Med. Ctr., 296 N.J. Super. 298, 318 (App. Div. 1997) (holding that claims that require different proofs from those needed to substantiate a CEPA claim have an independent basis and are not deemed waived), certif. denied, 153 N.J. 405 (1998).

A prima facie case of employment discrimination arising out of a failure to promote requires that plaintiff satisfy a three-step process. Greenberg v. Camden County Voc. & Tech. Sch., 310 N.J. Super. 189, 198 (App. Div. 1998) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677 (1973)). Plaintiff must show (1) that he is a member of a protected class, (2) that he was qualified for the position he sought, (3) that he was denied promotion, and (4) others with similar or lesser qualifications were promoted to the position, achieved the rank or position. Ibid. Likewise, the proofs necessary to establish a prima

facie case of hostile work environment based upon religion requires plaintiff to establish that (1) the conduct occurred because he is Jewish, (2) the conduct was severe or pervasive enough (3) to make one who is Jewish reasonably believe that (4) the conditions of employment have been altered and the working environment is hostile or abusive. Heitzman v. Monmouth County, 321 N.J. Super. 133, 147-48 (App. Div. 1999).

The court therefore erred in ruling that plaintiff's LAD claims alleging discriminatory failure to promote and hostile work environment were subject to CEPA's waiver provisions. Consequently, plaintiff's LAD claim alleging a failure to promote because of religious discrimination was viable and should have withstood summary judgment. In our view, however, plaintiff's claim of hostile work environment based upon religious discrimination lacks merit and therefore warranted summary judgment as a matter of law.

The sole evidence of discriminatory animus based upon religion consists of an allegation that Kempey scheduled department meetings on Jewish holidays. When deposed, however, plaintiff testified to one meeting being scheduled on the "eve of Yom Kippur" and another that "happened around Passover." The record is unclear as to whether Kempey or any of the other named defendants were the persons who actually scheduled those meetings. Further, plaintiff provided no information as to when the meetings actually occurred or were actually scheduled. Nor has plaintiff presented any evidence as to the frequency with which these department meetings

were scheduled or held on Jewish holidays. Indeed, according to plaintiff, "[they] rarely met" for department meetings.

Giving plaintiff the benefit of all favorable inferences, no jury could conclude that plaintiff has established sufficiently severe or pervasive scheduling of department meetings on Jewish holidays that would cause a reasonable person of the Jewish faith to conclude that the dates when meetings were scheduled or held were scheduled because plaintiff is Jewish, or that the scheduling or holding of such meetings was sufficiently severe or pervasive to cause a reasonable person of the Jewish faith to conclude that the working environment had become hostile or abusive. Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 24-25 (2002).

Moreover, there is no evidence linking Kempey to the facially neutral instances of harassment, e.g., vandalism of his office, anti-Semitic inscriptions on his car, or missing office supplies, from which a jury could reasonably ascribe those actions to plaintiff's Jewish religion. See Caver v. City of Trenton, 420 F.3d 243, 264 (3d Cir. 2005) (recognizing that "[t]he advent of more sophisticated and subtle forms of discrimination requires that [courts] analyze the aggregate effect of all evidence . . . including [that] concerning incidents of facially neutral mistreatment"). Finally, Kempey's alleged comment to plaintiff's colleague blaming Jewish faculty at Queens College for his not getting tenure was not directed to plaintiff. See Heitzman, supra, 321 N.J. Super. at 148.

C. The July 6, 2005 Partial Summary Judgment Order

Plaintiff next contends that in light of the court's decision in the partial summary judgment order of March 30, 2005, the State should have been precluded from bringing a second summary judgment motion. The motion judge rejected this argument, reasoning that because the second summary judgment motion was based upon different legal grounds, the court had the "inherent power, to be exercised in [the court's] sound discretion, to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment. See Cineas v. Mammone, 270 N.J. Super. 200, 207 (App. Div. 1994) (quoting Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987), certif. denied, 110 N.J. 196 (1988)). We agree.

Also regarding the July 6, 2005 order, plaintiff objects to the motion judge's conclusions pertaining to plaintiff's allegations of the various incidents about which he complained, including the alleged misappropriation and misuse of department funds, quid pro quo arrangements with faculty, and Kempey's alleged alteration of plaintiff's promotion application file. We need not decide whether or not the judge's rulings on these incidents severely limited plaintiff's ability to prevail on the CEPA claim. Plaintiff voluntarily dismissed the CEPA count and therefore his objections to the judge's ruling are moot.

(1)

Plaintiff next contends that the motion judge erred in dismissing his First Amendment and Fourteenth Amendment claims brought pursuant to 42 U.S.C. § 1983 (Counts Seven, Eight and Nine). Plaintiff alleges that defendants, acting under color of state law, violated his First Amendment rights to free speech and petition, and his Fourteenth Amendment rights to due process and equal protection.

The motion judge first concluded that Kean was not a person within the meaning of § 1983 because it was not authorized to sue or be sued in its own name, a factor critical to the analysis of whether public institutions are persons within the meaning of § 1983. Fine v. Rutgers, 163 N.J. 464, 470-71 (2000). Additionally, although the judge agreed with plaintiff that the allegations of "individual actions on the part of Dr. Kempey, [were] outside of his official capacity," thereby justifying the denial of the motion as to him, the judge also rejected the § 1983 claims against Applbaum and Esposito "in their individual capacities" because plaintiff failed to present any evidence of conduct on their part outside of their official capacities.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

> of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured[.]
>
> [Ibid.]

In Will v. Michigan Department of State Police, 491 U.S. 58, 64, 109 S. Ct. 2304, 2308, 105 L. Ed. 2d 45, 53 (1989), the Court held that "a State is not a person within the meaning of § 1983." The Court, explaining that "Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity," 491 U.S. at 66, 109 S. Ct. at 2310, 105 L. Ed. 2d at 55, extended its ruling to "governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." 491 U.S. at 70, 109 S. Ct. at 2312, 105 L. Ed. 2d at 57.

In Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655, 659 (3d Cir.), cert. denied, 493 U.S. 850, 110 S. Ct. 148, 107 L. Ed. 2d 107 (1989), the court summarized and clarified the nine factors, previously set forth in Urbano v. Board of Managers of New Jersey State Prison, 415 F.2d 247, 250-51 (3d Cir. 1969), cert. denied, 397 U.S. 948, 90 S. Ct. 967, 25 L. Ed. 2d 128 (1970), that courts are to consider in determining whether an entity is an "alter ego" or "arm of the state" for the purpose of Eleventh Amendment immunity and personhood under § 1983, reducing the nine factors to three:

> (1) Whether the money that would pay the judgment would come from the state (this includes three of the Urbano factors — whether payment will come from the state's treasury, whether the agency has the money to satisfy the

> judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts);
>
> (2) The status of the agency under state law (this includes four factors — how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation); and
>
> (3) What degree of autonomy the agency has.
>
> [Fitchik, supra, 873 F.2d at 659.]

Considering these factors the motion judge concluded that Kean is an alter ego of the State, thus implicating the Eleventh Amendment immunities.

Despite the fact that the judge reached this conclusion without any factual submissions from Kean in accordance with Rule 4:46-2(a), we are satisfied that the state colleges' enabling legislation dispels any suggestion that Kean is an entity responsible to itself. See Cohen v. Bd. of Trs. of UMDNJ, 240 N.J. Super. 188, 193-94 (App. Div. 1989) (holding UMDNJ and Rutgers are "guilds of scholars . . . responsible only to themselves") (quoting Snitow v. Rutgers Univ., 103 N.J. 116, 122 (1986)); see also N.J.S.A. 18A:64-1 to -84. While recent legislative enactments accord more autonomy to state colleges, the Governor, with the advice and consent of the Senate, appoints the Board of Trustees for each state college, N.J.S.A. 18A:64-3, the State retains oversight authority over the budget of state colleges, N.J.S.A. 18A:64-6(d), establishes the statutory requirements for awarding contracts,

N.J.S.A. 18A:64-55, and accounts of state colleges are subject to audit by the State at any time, N.J.S.A. 18A:64-6(f). Hence, the motion judge properly found that Kean is an arm of the State and was therefore not a person under 42 U.S.C. § 1983.

The Court in Will, supra, 491 U.S. at 71, 109 S. Ct. at 2312, 105 L. Ed. 2d at 58, likewise rejected the argument that state officials acting in their official capacity should be considered persons under Section 1983. The Court reasoned that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." Ibid.

None of the actions attributed to Applbaum, Esposito, and the Board, involve conduct outside the scope of their official capacities. Thus, the motion judge correctly held that they were not persons under Section 1983 for purposes of recovering a money judgment against them. However, plaintiff's complaint also sought injunctive relief in the form of a retroactive promotion and the removal of "false and defamatory evaluations" from his ARTP folders and personnel files.

In Will, the Court explained that a state official sued in his or her official capacity for injunctive relief "would be a person under §1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" 491 U.S. at 71 n.10, 109 S. Ct. at 2312 n.10, 105 L. Ed. 2d at 58 n.10 (quoting Kentucky v. Graham, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 3106, n.14, 87 L. Ed. 2d 114, 122 n.14 (1985)). See Fuchilla v. Layman, 109 N.J. 319, 324 ("One effect of the eleventh amendment is

to subject a state in a federal court to prospective injunctive relief, but not to a claim for damages."), cert. denied, 488 U.S. 826, 109 S. Ct. 75, 102 L. Ed. 2d 51 (1988).

The judge thus erred in dismissing plaintiff's claims for injunctive relief. However, even where injunctive relief is sought for violation of First Amendment rights, a plaintiff asserting a claim for retaliation for speech protected by the First Amendment must "show the protected activity was a substantial or motivating factor in the alleged retaliatory action." Baldassare v. State of N.J., 250 F.3d 188, 195 (3d Cir. 2001).

Here, plaintiff failed to submit evidence sufficient to raise a fact issue whether Esposito took any action against plaintiff in retaliation for anything that he did or said. Esposito became president of Kean in March 2002, after both of plaintiff's promotion denials. There was no evidence that Esposito was involved in either of the promotion decisions or that Esposito was involved in plaintiff's alleged hostile work environment. Affording plaintiff the benefit of all favorable inferences, plaintiff failed to raise a fact issue as to whether Esposito retaliated against him.

On the other hand, in his opposition to defendant's summary judgment motion, plaintiff set forth facts to refute Applbaum's articulated reasons for declining to nominate plaintiff for promotion on both occasions. In Applbaum's deposition testimony, he acknowledged that he promoted persons who were unranked and he could not recall at that time whether those persons

were also unpublished or published in unrefereed[3] publications. He also testified that he could not recall whether any of these persons had filed a complaint against Kean.

Thus, when the evidence is viewed most favorably, there is a causal connection between the exercise of plaintiff's First Amendment rights and the denial of his promotion sufficient to defeat summary judgment on plaintiff's claim seeking injunctive relief against Applbaum and the Board. Consequently, the court erred in dismissing that claim. However, because Applbaum is no longer president of Kean, plaintiff's claim for injunctive relief against him is moot. See Bunting v. Mellen, 541 U.S. 1019, 124 S. Ct. 1750, 158 L. Ed. 2d 636 (2004) (finding as a reason to deny certiori the fact that the claims for declaratory and injunctive relief were moot because the parties were no longer at the institution); In re Advisory Comm. on Prof'l Ethics Opinion 621, 128 N.J. 577 (1992) (finding that the case was moot as to appellant attorney because he decided not to accept employment in the position in question).

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[3] An unrefereed publication is one which has not been reviewed prior to publication. See Merriam Webster's Collegiate Dictionary (10th ed. 1996). See also Alan Jay Smith, The Task of the Referee, Univ. of Cali. Berkeley, Computer Archive Vol. 23 Issue 4 (April 1990), which describes the role of a referee as "decid[ing] whether a paper makes a sufficient contribution to the field."

(2)

Plaintiff contends the judge erred in holding that his speech, other than his complaints about race discrimination, was not protected under 42 U.S.C. § 1983 because it was not of public concern. Plaintiff urges that at a publicly funded university, items such as misuse of funds, unqualified faculty, and a department chair entering a dean's office allegedly to alter a promotion application are matters of public concern. We agree.

In Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), the Supreme Court set forth the appropriate analysis in determining whether speech concerns a matter of public concern. The Court stated, "[w]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," the court should not review the wisdom of a personnel decision allegedly taken in retaliation. 461 U.S. at 147, 103 S. Ct. at 1690, 75 L. Ed. 2d at 720. The Court explained that speech is a matter of public concern if it relates to "any matter of political, social or other concern to the community," and that it "must be determined by the content, form, and context of a given statement, as revealed by the whole record." 461 U.S. at 147-48, 103 S. Ct. at 1690, 75 L. Ed. 2d at 719-20. The Court noted that "[t]he inquiry into the protected status of speech is one of law, not fact." 461 U.S. at 148 n.7, 103 S. Ct. at 1691 n.7, 75 L. Ed. 2d at 721 n.7.

In Versarge v. Township of Clinton, 984 F.2d 1359, 1364-66 (3d Cir. 1993), the plaintiff, a fire fighter, informed the mayor and council that the fire house had been remodeled without the required permits, but waited to do so until after a dispute with the fire chief about a road closure. Concluding that the letter was speech involving "at most, limited public concern," id. at 1366, the court explained that plaintiff's motive was relevant, but not determinative, and that speech does not attain protected status because it might have been of public concern in different circumstances. Id. at 1365. The court rejected the plaintiff's assertions that he was motivated by safety considerations and found that he was motivated by a "personal grudge." Ibid.

Here, as in Connick and Versarge, plaintiff's grievance and complaints about Kempey's strategies to retain power, including "quid pro quo" arrangements and hiring allegedly unqualified faculty, were matters of personal interest in that plaintiff's goals were to remove Kempey's unfavorable reviews from his file and to attain promotion. However, considering the whole record most favorably towards plaintiff, he also sought to expose what he considered gross mismanagement of the Economics Department and wrongdoing on the part of a public university professor. "Needless to say, allegations of corrupt practices by government officials are of the utmost public concern." O'Donnell v. Yanchulis, 875 F.2d 1059, 1061 (3d Cir. 1989). See also Stomel v. City of Camden, 2007 N.J. LEXIS 909 (N.J. July 25, 2007) (noting defendants conceded that the plaintiff's speech, in reporting solicitation of a contribution to the mayor's campaign in exchange

for reappointment as the City's public defender, and testifying at the mayor's trial, was a matter of public concern); Baldassare, supra, 250 F.3d at 195-97 (holding county prosecutor investigating possible criminal activity of two subordinates qualified as a matter of public concern); Feldman v. Philadelphia Hous. Auth., 43 F.3d 823, 829 (3d Cir. 1994) (finding that report of an internal auditor of a public housing agency disclosing the promotion of an employee involved in an illegal bid-rigging scheme and other improprieties in personnel decisions implicated "matters of important public concern"). Thus, the motion judge erred in dismissing this portion of plaintiff's First Amendment claim. However, because plaintiff voluntarily dismissed his First Amendment claim against Kempey, this claim only remains viable against the Board.

(3)

Plaintiff maintains that the judge erred in dismissing his claim for violation of his First Amendment right to petition. Plaintiff specifically disputes the judge's findings that his petitions were filed after his first promotion denial and that Kempey did not participate in the second promotion denial.

The judge identified plaintiff's protected petitions under the First Amendment as his AA complaint, his letter adding religious discrimination to his AA complaint, and the present lawsuit. The judge found that plaintiff's First Amendment right to petition was limited to his second promotion denial because all of the relevant petitions "were filed after plaintiff's first denial of promotion."

Additionally, the judge was of the view that the allegations against the individually named defendants, other than Kempey, implicated conduct only in their official capacity for which they were not persons under Section 1983. Consequently, the judge limited plaintiff's First Amendment right of petition to Kempey, as to whom the court found plaintiff had presented sufficient evidence that he acted outside of the scope of his official capacity. The court concluded, however, that even as to Kempey, the facts, when favorably viewed, did not establish a prima facie case of violation of plaintiff's First Amendment right of petition.

The court noted that Kempey's negative peer reviews occurred in the Fall of 2000, prior to plaintiff filing his internal AA complaint and the present lawsuit. Additionally, the court noted that Kempey did not participate in the second ARTP Committee evaluation of plaintiff's second application for promotion. The judge acknowledged that Kempey's "alleged defamatory peer review" may have been part of the second promotional packet, but reasoned that it could not be considered as evidence of retaliation for plaintiff's petitions because Kempey prepared it prior to the petitions.

Plaintiff is correct that he filed his AA complaint prior to the final decision on his first promotion application. However, the court's misstatement of fact is of no moment because it was Applbaum, rather than Kempey, who made the final decision.

Kempey's negative recommendation on plaintiff's first promotion application occurred during the Fall of 2000. As to plaintiff's second promotion application, there is no evidence connecting Kempey to the decision of either the ARTP Committee or the UPC in the Fall of 2001, through direct opposition, quid pro quo arrangements or otherwise. Carreno and Saffer, who, according to plaintiff, were Kempey's "posse" and parties to the alleged quid pro quo arrangements, boycotted the 2001 ARTP Committee, resulting in a unanimous vote in favor of plaintiff's promotion. Neither served on the UPC, which voted plaintiff as qualified for promotion, albeit not in the top one-third of promotion-eligible candidates.

The judge therefore properly dismissed plaintiff's claim against all of the defendants for violation of his First Amendment right to petition in so far as plaintiff seeks to recover money damages. However, because plaintiff sought injunctive relief in this claim as well, the court erred, for the reasons discussed earlier, in dismissing plaintiff's claim for injunctive relief against the Board. Will, supra, 491 U.S. at 71 n.10, 109 S. Ct. at 2312 n.10, 105 L. Ed. 2d at 58 n.10 (quoting Kentucky v. Graham, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 3106, n.14, 87 L. Ed. 2d 114, 122 n.14 (1985)).

(4)

Plaintiff next complains that the motion judge erred in dismissing his due process and equal protection claims (Count Nine). Plaintiff argues that the judge was incorrect in holding that he had no property interest in obtaining a promotion and that the judge misinterpreted his equal protection claim.

In his June 21, 2005 written opinion, the motion judge explained that essential to a procedural due process claim under the 14th Amendment is proof of a life, liberty or property interest. He concluded that plaintiff had not established a property interest in his promotion.

The Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. art. XIV, § 1. In Board of Regents v. Roth, a state university assistant professor hired for a term of one year was not renewed at the end of the year. 408 U.S. 564, 566, 92 S. Ct. 2701, 2703, 33 L. Ed. 2d 548, 554 (1972). He claimed that his non-renewal was in retaliation for criticism of the administration and that the absence of reasons for his nonrenewal and an opportunity to refute them violated his right to procedural due process. 408 U.S. at 568-69, 92 S. Ct. at 2704-05, 33 L. Ed. 2d at 556. Holding that the plaintiff did not have a due process property interest in continuation of his job, the Court said,

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

> Property interests, of course, are not created by the Constitution. Rather, they are created . . . by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits[.]
>
> [408 U.S. at 577, 92 S. Ct. at 2709, 33 L. Ed. 2d at 561.]

See also Hill v. Borough of Kutztown, 455 F.3d 225, 234-35 (3d Cir. 2006) (at-will borough manager had no legal entitlement to continued employment and thus was not protected by due process).

The District Court addressed whether a New Jersey public employee who was denied a promotion could assert a claim under § 1983 in Pollock v. City of Ocean City, 968 F. Supp. 187 (D.N.J. 1997). There, the chief of police promoted his friend to deputy chief instead of the plaintiff. Id. at 188-89. The plaintiff scored first on the civil service test and enjoyed preferential treatment as a veteran, but the court concluded that this gave the plaintiff "no legitimate claim of entitlement under the Constitution or laws of New Jersey to a promotion to deputy chief of police." Id. at 190.

Here also, plaintiff had no legitimate claim of entitlement to a promotion and his reliance upon Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) is misplaced. There, the Court addressed "what pretermination process must be accorded a public employee who can be discharged only for cause." 470 U.S. at 535, 105 S. Ct. at 1489, 84 L. Ed. at 499. Loudermill had a property interest in his

employment because, under a state civil service statute, he could be terminated only for cause. 470 U.S. at 538-39, 105 S. Ct. at 1491, 84 L. Ed. 2d at 501. Plaintiff, however, has no analogous right to a promotion.

Plaintiff is also incorrect that he had a liberty interest in his reputation that was protected by the Fourteenth Amendment. Plaintiff's failure to be promoted does not qualify as a liberty interest in his reputation. See Robb v. Philadelphia, 733 F.2d 286 (3d Cir. 1984); see also Pollock, supra, 968 F. Supp. at 187 (holding that "failure to promote claims do not have a valid constitutional basis and are not cognizable under 42 U.S.C. § 1983"). Plaintiff has retained his employment and there is no indication that his prospects of a future promotion or other employment are impaired.

Plaintiff cites Kadetsky v. Egg Harbor Township Board of Education, 82 F. Supp. 2d 327, 331-33 (D.N.J. 2000), in which a tenured high school band director alleged a deprivation of his liberty without due process when his principal (whom the plaintiff had previously reported for drinking beer while chaperoning a school trip) concocted reprimands against him, falsely induced a parent's complaint against him and misrepresented it to the administration and the board of education, and otherwise harassed and defamed him.

The court in Kadetsky held that because the plaintiff was not discharged, he failed to show "stigma to reputation" that is "accompanied by [a] tangible deprivation such as the loss of present or future employment." Id. at 338. The court concluded

that plaintiff thus had no liberty or property interest protected by the due process clause of the Fourteenth Amendment. However, the court determined that the plaintiff's state due process claim was viable because, in accordance with Doe v. Poritz, 142 N.J. 1, 104 (1995), the New Jersey Constitution protects one's "interest in reputation without requiring any other tangible loss." 82 F. Supp. 2d at 338.

Plaintiff here is not claiming a violation of due process under the New Jersey Constitution. Each of his New Jersey constitutional claims alleged retaliation and thus were properly dismissed by the court, in its March 30, 2005 order, as duplicative to his state CEPA claim. N.J.S.A. 34:19-8. Consequently, plaintiff has not shown any liberty or property interest in his promotion and the judge thus properly dismissed his Fourteenth Amendment due process claim against the State on this basis.

As to plaintiff's equal protection claim, the motion judge discerned that plaintiff's theory was two-pronged. Kempey discriminated against him because (1) he was Jewish, and (2) he supported an African American faculty member. The judge rejected the Jewish discrimination claim because it was based on a statement attributed to Kempey that was "inadmissible double hearsay and therefore not of moment for the purposes of this motion." He also rejected the claim that he was denied equal protection because of his support of Jackson as being inconsistent with plaintiff's claim that there was a split between the Jewish and Black faculty.

As an initial observation, the equal protection clause of the Fourteenth Amendment does not cover retaliation, because retaliation is part of a First Amendment claim, for exercising speech or petition rights or, part of a due process claim for exercising liberty or property rights. See R.S.W.W., Inc. v. City of Keego Harbor, 397 F.3d 427, 440 (6th Cir. 2005) (plaintiff's "retaliation claim does not . . . arise under the Equal Protection Clause"); Watkins v. Bowden, 105 F.3d 1344, 1354 (11th Cir. 1997) ("A pure or generic retaliation claim . . . simply does not implicate the Equal Protection Clause"). Thus, plaintiff's retaliation-based claims brought under the equal protection clause were properly dismissed.

Plaintiff's equal protection claims are also based upon religious discrimination. Neither party addressed this issue before the trial court and we decline to do so in this opinion. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

Finally, as to the court's ruling on the hearsay statement, in the context of discrimination claims, hearsay statements have been deemed admissible where the statement relates to policy or practice of the employer and was uttered by one authorized to make such a statement. See Spencer v. Bristol-Meyers Squibb Co., 156 N.J. 455, 464 (1998) (citing Abrams v. Lightolier, 50 F.3d 1204 (3d Cir. 1995) (a subordinate's account of the employer's articulated reason for a particular employment decision is admissible against the employer)).

In this case, the statement attributed to Kempey was uttered to one of plaintiff's colleague's and had nothing to do with a policy or practice of Kean. Additionally, the statement, if made, was made years earlier and was not directed towards plaintiff. Therefore, the motion judge properly rejected this statement as evidence supporting plaintiff's equal protection claim.

III.

The Discovery Motions

We next address the court's discovery rulings entered prior to granting defendants' partial summary judgment motions. In early 2003, plaintiff filed his first discovery motion in which he sought an order compelling defendants to release files of faculty members promoted to associate professor between 2000 and 2002, the time period when plaintiff also sought promotion to associate professor. The State initially agreed to produce the discovery. Eighteen months later, however, only ten or twelve of the twenty-one files sought were produced, and those files were not complete. Defense counsel represented that he did not anticipate that all documents sought would be provided because Kean only retained a portion of the files. In addition, plaintiff also sought but was unable to obtain the handwritten notes of the internal investigation of plaintiff's complaints because the notes were destroyed once the formal report was completed.

Plaintiff contends that these discovery violations should have resulted in the denial of defendants' summary judgment motion. We disagree.

The promotional files of similarly situated faculty members were irrelevant to the primary issue before the motion judge, which was whether plaintiff's claims of retaliation brought under the LAD, New Jersey Constitution and United States Constitution were preempted by the waiver provisions of CEPA. The resolution of this discrete issue was in no manner conditioned upon defendant's disclosure of faculty promotional files or compliance with prior discovery orders. Thus, the trial judge did not err in considering Kean's summary judgment motion without first resolving the outstanding discovery issues.

Plaintiff also contends that the court's May 28, 2004 order improperly denied to plaintiff discovery of (1) the records of Kempey, Carreno, Griffith (Jonnard) and Tully, other Economics Department faculty whom plaintiff alleges were less qualified than he was but were treated more favorably, (2) the records of Jackson, a victim of race discrimination, and (3) documents relevant to plaintiff's whistle-blowing activity.

The State contends that plaintiff's discovery request was overly broad, unduly burdensome, and harassing. They further assert that the information sought was the private information related to over sixty employees who did not compete with plaintiff during the period of time plaintiff sought promotion to associate professor.

At oral argument of plaintiff's discovery motion on May 14, 2004, plaintiff specifically requested records of three faculty members in the Economics and Finance Department, Carreno, Jonnard and Tully,

whom he alleged were not Jewish, did not exercise whistle-blowing rights, and were treated favorably in their tenure and/or promotion applications. The motion judge denied the request because "it is not the associate professor's promotions." Plaintiff also requested the records of Jackson, the African-American professor whom plaintiff supported. The judge said, "I'm not going to address it." Finally, plaintiff requested Kempey's performance evaluations to ascertain whether Kempey's superiors condoned his conduct toward plaintiff. The judge denied the request without discussion.

In Dixon v. Rutgers University, 110 N.J. 432, 435-37 (1988), the plaintiff, an assistant professor and chair of the Academic Foundations Department at Rutgers' Camden College, alleged that she was denied a promotion because she was female (the Promotion Review Committee recommended a denial of both tenure and promotion, and the Board of Governors awarded Dixon tenure but not a promotion). The Court held that plaintiff was entitled to discovery of the promotion packets of two male assistant professors and Academics Foundation Department chairs at other campuses, who were promoted. Id. at 435.

The Court in Dixon initially determined that the documents were relevant to prove intentional discrimination by showing that plaintiff was treated disparately, i.e., that the employer treated some employees less favorably than others because of their gender. Id. at 442. The Court held that the credentials of the other faculty members were relevant, even though their responsibilities and assignments were different from the plaintiff's, and

they were considered for promotion at different times. Id. at 444. "To the extent that there is evidence that can be suitably used in a comparison, therefore, such evidence will be relevant in this case." Ibid.

The Court in Dixon explained: "Only through comparison can [Dixon] show that male faculty members received promotion and tenure though less qualified; and only by comparing her record with others can she show that the rationale for her denied tenure and promotion was not equally applied to exclude others." Id. at 445.[4]

Plaintiff is thus entitled to the promotion folders of other faculty members who were promoted during the time he sought promotion. Further, plaintiff is also entitled to promotion files of faculty members promoted reasonably close in time before plaintiff applied for promotion or reasonably close in time subsequent to plaintiff's promotion application, to the extent the criteria for promotion remained the same. Thus, for example, if persons were promoted both before and after plaintiff and were unranked and unpublished, such evidence may be relevant to rebut Applbaum's articulated non-discriminatory reason for not recommending plaintiff's promotion by demonstrating inconsistency in the application of promotion criteria. Id. at 443.

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[4] The Court in Dixon recommended protective orders such as limiting access to the records, to minimize the intrusion into their confidentiality. 110 N.J. at 456-57.

However, a comparison of plaintiff's credentials to those of Jonnard and Tully would not show disparate treatment because they were not treated more favorably than plaintiff. Neither Jonnard nor Tully was promoted from assistant to associate professor. Jonnard did not apply for the promotion. Tully applied in 2002-03 and 2003-04, but the UPC did not rank her and she was not promoted. However, their files may be relevant to address other issues raised by plaintiff, who claims they were afforded preferential treatment and were unqualified for the positions they held.

A comparison of plaintiff's credentials to those of Kempey would not show disparate treatment because Kempey arrived at Kean in 1978, eighteen years before plaintiff, and apparently obtained his promotions well before he became department chair in 1999. Nonetheless, Kempey's personnel file may be relevant to other issues raised by plaintiff related to plaintiff's allegation that Kean failed to take appropriate action against Kempey in connection with the alteration of plaintiff's promotion files and Kempey's failure to adhere to department policies as identified in the AA auditor's report. Such evidence may also be relevant to plaintiff's claim that Kean was aware of Kempey's conduct but acquiesced in addressing it and in fact encouraged it.

Plaintiff is not seeking to compare his credentials and treatment to those of Jackson, but asserts that Jackson's records are relevant because Jackson was a victim of race discrimination. Plaintiff voluntarily dismissed his claims alleging retaliation for reporting race discrimination against Jackson. Plaintiff claims that Kempey exhibited a

discriminatory animus towards blacks, women and Jews, which, in the aggregate, may demonstrate a general predisposition against minorities, and his personnel records may be relevant on the issue of Kean's notice of any such propensities or allegations of such propensities.

Finally, plaintiff requests "documents relevant to [his] whistleblowing activity." Because he voluntarily dismissed the CEPA claim at trial, he is not entitled to discovery related to his whistle-blowing claim.

Plaintiff next complains that the court's March 18, 2005 order denied his motion to reopen discovery for the limited purpose of compelling Ogar to comply with the subpoena served upon him in October 2003. The court denied the motion, concluding that there had been 988 days of discovery, numerous extensions, and that plaintiff had failed to advance any "exceptional circumstances other than they found him or they believe they found him and therefore they want to take his deposition." In an earlier discovery motion related to Ogar, the court viewed his testimony as only "peripheral."

We agree with plaintiff that the denial of plaintiff's motion to reopen discovery was an abuse of discretion. Since the "Best Practices" rule amendments were adopted in 2000, we have stated that the amendments "were not designed to do away with substantial justice on the merits or to preclude rule relaxation when necessary to 'secure a just determination.'" Tucci v. Tropicana Casino and Resort, Inc., 364 N.J. Super. 48, 53 (App. Div. 2003); see also Ponden v. Ponden, 374 N.J. Super. 1, 9 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005).

Rather, the amendments were adopted to "counteract an unfortunate and increasingly dilatory, casual and desultory approach by some members of the bar to their litigation responsibilities[.]" Tucci, supra, 364 N.J. Super. at 53. The record of plaintiff's counsel's attempt to depose Ogar bespeaks repeated due diligence.

Ogar was first served with a subpoena in October 2003 to appear for a deposition on November 12, 2007. The subpoena was served upon Ogar's attorneys, Michael Spero, Esq. and McCarthy & Scharzman, who agreed to accept service of the subpoena on his behalf. They advised plaintiff's counsel that Ogar was out of the country and was expected to return by Thanksgiving of that year. Plaintiff's counsel attempted to schedule Ogar's deposition in March 2004 and received correspondence from Ogar's attorneys the following month advising that Ogar was in Africa and was not expected to return before July 2004.

Plaintiff's counsel responded by immediately filing a motion to compel Ogar's deposition. Ogar's attorney sent the court a letter dated April 22, 2004, advising the court that he did not represent Ogar "concerning motions referenced in the matter," that he "[had] not been authorized to act on his behalf," and that he had provided the information that Ogar was in Africa "only as a courtesy." The motion was denied.[5]

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[5] Although the motion judge indicated on the order denying the motion that the reasons were placed on the record May 15, 2004, no transcript of that proceeding is part of the record on appeal.

During a case management conference conducted in August 2004, after which discovery was extended through September 30, 2004, plaintiff's counsel again renewed his request to depose Ogar, who reportedly would return to the United States in three months. The court instructed plaintiff's counsel to "forget Dr. Ogar," not because his testimony was necessarily irrelevant, but because it was not "necessary to depose every person that might have any possible knowledge about anything in the case." The court advised plaintiff's counsel that he was free to call him at the time of trial but that the court was not going to "delay this case to take his deposition."

It is evident from this record that prior to seeking to reopen discovery in March 2005, plaintiff's counsel had undertaken a genuinely good faith and diligent effort to depose the witness. Ogar, as the Union's representative during the period when plaintiff was complaining about the conduct of Kempey, may have provided testimony linking the Union to the administration's handling of plaintiff's complaints, thereby enabling plaintiff to produce evidence of a conspiracy sufficient to raise a genuinely disputed issue of fact as to whether the Union acted on behalf of Kean in response to plaintiff's complaint and thus was liable under CEPA. N.J.S.A. 34:19-2(a). The motion judge dismissed plaintiff's CEPA and constitutional claims against the Union because of the lack of evidence that they were acting in concert with Kean. The judge's discovery ruling may have frustrated plaintiff's efforts to present sufficient facts to defeat the motion.

Additionally, Ogar, as a union representative, may have had relevant information pertaining to faculty members who were promoted when plaintiff was not, or information that could potentially undermine defendants' purportedly legitimate, nondiscriminatory reason for not promoting plaintiff. Consequently, the denial of plaintiff's motion to reopen discovery in order to depose Ogar resulted in a substantial injustice to plaintiff.

IV.

In summary, we first reverse that portion of the March 30, 2005 order dismissing plaintiff's LAD claim in which he alleges that he was denied promotion to Associate Professor because he is Jewish. Second, we reverse that portion of the July 6, 2005 order dismissing plaintiff's First Amendment claims against the Board seeking injunctive relief arising out of plaintiff's claim that he was subject to retaliation for speaking out on matters of public concern and exercising his right of petition. Third, we vacate that portion of the July 6, 2005 order dismissing plaintiff's Fourteenth Amendment Equal Protection Clause claim based upon religious discrimination and reinstate that claim without regard to its merits. Fourth, we reverse the May 28, 2004 order denying discovery of the promotion and/or personnel files of faculty. The trial court shall review the files in advance of disclosure to ensure that only materials relevant to plaintiff's promotion claims are released. Fifth, we reverse the March 18, 2005 order denying plaintiff's motion to depose Ogar.

The remaining arguments advanced by plaintiff are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed in part, affirmed in part. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/

CLERK OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
UNION COUNTY, NEW JERSEY
DOCKET NO. UNN-L-5247-01

BRUCE M. SKOORKA Plaintiff, vs. KEAN UNIVERSITY, ET AL Defendants.	TRANSCRIPT OF HEARING

Place: Union County Courthouse
Two Broad Street
Elizabeth, New Jersey 07207

Date: October 18, 2005

BEFORE:

THE HONORABLE KATHERINE R. DUPUIS, J.S.C.

TRANSCRIPT ORDERED BY:

KENNETH A. GOLDBERG, ESQ.
(GOLDBERG & FLIEGEL LLP)

APPEARANCES:

KENNETH A. GOLDBERG, ESQ.
(GOLDBERG & FLIEGEL LLP)
CHRISTOPHER FARELLA, ESQ.
Attorneys for the Plaintiff

JOSEPH MICHELETTI, ESQ.,
Deputy Attorney General
MARISA KAZ, ESQ., Deputy Attorney General
Attorneys for Defendant

LYNN COHEN-MOORE
Automated Transcription Services
P.O. Box 2230
Laurel Springs, New Jersey
(856) 401-0142
AUTOMATED TRANSCRIPTION SERVICES

INDEX

October 18, 2005

DECISION

By: The Court 9, 18

* * *

[18]

BRUCE M. SKOORKA, PLAINTIFF'S WITNESS, SWORN:

THE CLERK: State your name for the record, please.

MR. SKOORKA: Bruce Skoorka.

THE CLERK: Keep your voice up a little bit.

MR. SKOORKA: Bruce Skoorka.

THE COURT: Okay. Mr. Skoorka, at this point, you're making a legal judgment call as to how to handle your matter. You could go forward to trial with some pretty damaging rulings from the previous case from Judge Anzaldi or it's my understanding that you don't wish to go forward the way the case looks now. You want to dismiss this case and I gather take an appeal of Judge Anzaldi's rulings and depending on what

[19]

happens then, perhaps we'll see you again based upon Judge Anzaldi having made errors in his rulings. Is that your understanding of what we're doing?

MR. SKOORKA: It's my understanding I believe that the case will be futile on the judges prior rulings and the rulings yesterday and today and I understand the ramifications and I reserve my appeal rights.

THE COURT: All right. Nobody's forcing you to do this?

MR. SKOORKA: Nobody's forcing me to do this. I see it as my only option at this point.

THE COURT: Okay and we had a short colloquy on the record on the 10th floor while you were on the first floor and your attorneys caught you up on that and told you what happened with regard to that this morning?

MR. FARELLA: The evidentiary rulings this morning.

MR. SKOORKA: Yes.

THE COURT: Okay. You don't feel under any kind of pressure other than the pressure anyone would feel under a lawsuit is that — that correct?

MR. SKOORKA: Any pressure to do what I'm doing now?

[20]

THE COURT: To do what you're doing, yes.

MR. SKOORKA: No, I don't feel pressure to do what I'm doing now. It would be futile to continue at this point.

THE COURT: All right. That's a — counsel, any questions?

MR. MICHELETTI: I'm duty bound, I have to, Your Honor. In terms of reserving appeal rights, I don't know the effect of a voluntary dismissal on those appeals.

THE COURT: I don't either and I don't give legal advice, so — I am — he makes a good point. I don't know — I don't know where you are in the appeal

process. I don't know what your dates are, when you can file things. I don't know and I'm not making any representation as to that. You're dealing with your attorneys on — on the dates of appeal, et cetera. You understand that?

MR. SKOORKA: Yes.

THE COURT: It's a tech — it's a technical issue as to when you can file them and neither the State nor I are telling you — giving you any advice with regard to that. You rely on your attorneys. Is that correct?

MR. SKOORKA: That's correct.

[21]

THE COURT: All right. We normally go through these questions and we find out people's education, et cetera, but he's clearly, you know, a man who's educated and knows what he's doing. All right.

That being the case, you two will be filling out mutual releases? Well I think that's part of dismissal, yeah.

MR. MICHELETTI: Well, it's — yeah — it's just a dismissal. I don't think there's a release to be signed.

THE COURT: You don't think you have to do it, yeah.

MR. FARELLA: Dismissal with prejudice.

MR. MICHELETTI: Yes, Your Honor, so that's — in terms of — oh, I guess I should put on the record they did request, and I think is so the dismissal

doesn't cause costs to be incurred that the offer of judgment be withdrawn. For these purposes, absolutely, the offer of judgement is withdrawn. If for whatever reason, sometime in the future, the case is reinstated, then the offer of judgement will be remade.

THE COURT: All right. I missed — somebody said dismissal without prejudice or with prejudice?

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MR. FARELLA: With prejudice.

THE COURT: With prejudice. Okay. I just want to make sure we're all clear on that. Okay, thank you very much. It would have been a pleasure to spend some time with you, but some other case.

Thank you.

* * *

CERTIFICATION

I, Lynn Cohen Moore, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the matter of BRUCE M. SKOORKA VS. KEAN UNIVERSITY, ET AL, Superior Court, Law Division, Civil Part, on October 18, 2005, Audiotape Number 282-05, Index Number 0001 to 1340 prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

Lynn Cohen-Moore	368 AOC Number

Dated: October 26, 2005

SUPERIOR COURT OF NEW JERSEY
UNION COUNTY — LAW DIVISION

DOCKET NO. UNN-L-5247-01

SKOORKA

vs

KEAN UNIVERSITY,
et al

CIVIL ACTION
ORDER OF DISMISSAL/
DISPOSITION

FILED
OCT 18 2005
KATHERINE R. DUPUIS
J.S.C.

It is on this 18th day of October, 2005, ORDERED that this matter is hereby dismissed/disposed due to the following:

____ 05 Tried to Comp. w/jury
____ 07 Tried to comp. w/o jury
____ 08 Default
____ 09 Summary Judgment
_X_ 10 Dismissed w/Prejudice
____ 11 Dismissed Rule 1:13
____ 12 Dismissed w/o Prejudice
____ 14 Transfer to another County
____ 15 Transfer to another Court
____ 18 Reinstated
____ 45 Inactivated
____ 29 Settled by Conference w/Judge
____ 27 Settled Friendly Hearing Comp.

____ 82 Default Judgment-Prf. hrg. comp.

____ 23 Settled before trial date assigned

____ 04 Partially tried

____ 24 Settled after TD but before trial w/o aid of Court

____ 24 Settled after TD assigned but before trial with aid of Court

____ 24 Settled on TD but before trial commences w/o aid of Court

____ 24 Settled on TD but before trial commences with aid of Court

____ 25 Settled while scheduled for Arbitration

____ 26 Settled while scheduled for other CDR

____ 28 Settled by other CDR

____ 17 Settled by Statutory ARB/50 day dismissal

____ Plaintiff Attorney failed to appear. Dismissed by Court.

____ Plaintiff failed to appear. Dismissed by Court.

____ Defendant failed to appear. Strike defendants pleadings. Defenses are suppressed.

____ Plaintiff and defendant failed to appear. Dismissed by Court.

____ It is further ORDERED that the plaintiff/defendant shall serve a copy of this ORDER on the plaintiff/defendant within 10 days of the above date.

COMMENTS Dismissed with prejudice.

Attorneys are to sign on lines provided below:

/s/ for Plaintiff

/s/ for Defendants

/s/ Katherine R. Dupuis
Katherine R. Dupuis, J.S.C.

cc: all counsel